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No. 73-2035

In the
Supreme Court of the United States
OCTOBER TERM, 1974

The Toledo, Peoria & Western Railroad Company,
Petitioner,

vs.

Charles N. Wasson, doing business as Wasson Towing Company, Owner of the Motor Vessel DEL RIO, and Wasson Towing Service, Inc., Bareboat Charterer of the Motor Vessel DEL RIO, For Exoneration From or Limitation of Liability,

Respondent and Cross Petitioner.

CROSS PETITION FOR WRIT OF CERTIORARI

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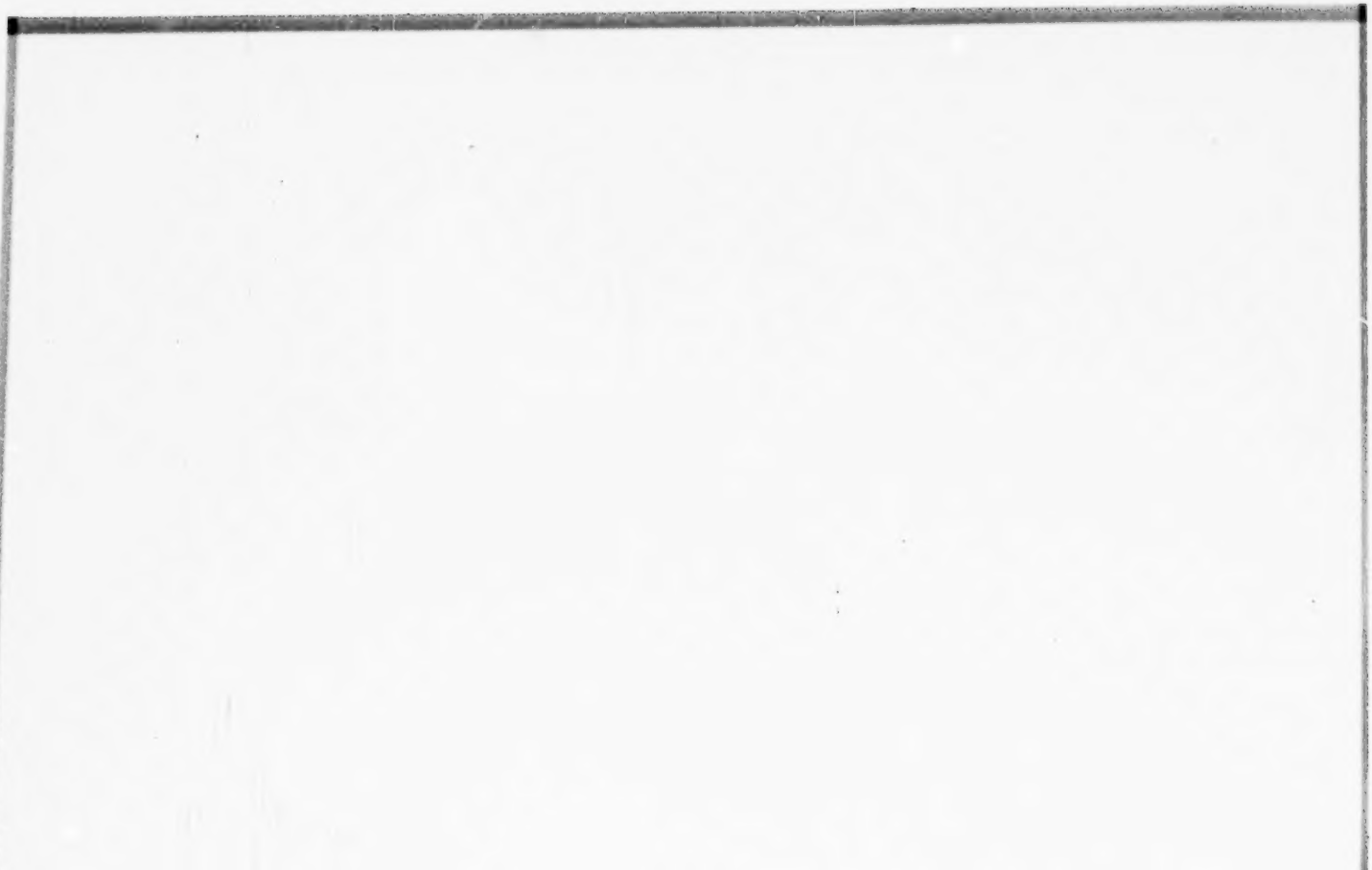

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The Supreme Court has a special relationship to substantive maritime law and this is an issue of fundamental importance to the relationship between river commerce and the rights of those having structures in navigable waters.

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Opinion Below

Charles N. Wasson, doing business as Wasson Towing Company, and Wasson Towing Service, Inc., respectively the owner and bareboat charterer of the Motor Vessel DEL RIO (hereinafter called "Wasson"), cross petition for writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit in this cause. The opinion is unofficially reported at 495 F.2d 571 (1974).

Jurisdictional Statement

The opinion below was entered on April 17, 1974. No rehearing was sought. No extension of time within which to file this cross petition of certiorari has been sought.

Jurisdiction to grant certiorari exists under 28 U.S.C. §1254.

Question Presented

The sole question presented by this cross petition for writ of certiorari is whether an owner of a bridge spanning navigable waters is owed a duty by a river operator not to arrange his tows three barges wide, in accordance with universal practice on that water, where the bridge owner had not complied with its duty to reconstruct or rebuild the bridge to accommodate the growing needs of river navigation.

Controlling Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations

The action below was a limitation of liability proceeding commenced under 46 U.S.C. §183.

Statement of the Case

The action below was commenced by Wasson for exoneration from, or limitation of, liability with respect to a collision between the DEL RIO tow and the Toledo, Peoria & Western Railroad Company bridge (hereinafter referred to as "TP&W") spanning the Illinois River at Peoria, Illinois on February 12, 1970. (A. 13-18)

The TP&W filed a claim for damage to its bridge.

At the conclusion of the trial the District Court ruled orally from the bench and found what it characterized as "all of the essential issues" of liability and limitation in favor of the claimants. (A. 26)

Specifically it found that the tow of the DEL RIO consisted of twelve barges, which were arranged three

barges wide and four barges long for a length, including the towboat, of 900′ and a width of 105′. (A. 29)

He found that this tow configuration was too wide to be safely navigated through the Peoria bridges without damage thereto or to the bridge appurtenances. (A. 29)

As the District Court found, the TP&W bridge provided an open draw for navigation of 118 feet. (A. 27) The District Court concluded that what he characterized as the excessive width of the tow, in relation to the bridge dimensions and other geographical realities of that area, constituted the proximate cause of the casualty. (A. 30-31)

He found the DEL RIO "unseaworthy" by reason of its width of three barges, and for no other reason. (A. 31)

He found Wasson liable for the casualty. (A. 31) The District Court did not find any pilot error or any other failure or insufficiency associated with the DEL RIO or its crew.

With respect to the TP&W bridge, the District Court found that it had originally been constructed in the mid-nineteenth century. It was built in 1857. (A. 29)

The District Court awarded judgment in favor of the TP&W in the amount of $876,650, as a result of damage done to the bridge. It also denied limitation of liability, because Wasson's managing agents knew that their tows were being made up 3 barges wide.

Wasson filed timely notice of appeal to the Court of Appeals for the Seventh Circuit.

Insofar as here material, Wasson appealed the following conclusions of the District Court:

> "I just do not think that river traffic can continually increase its size and weight, length and breadth to the point where it becomes dangerous under the natural river conditions to navigate it through existing bridges, which I think are presumed to be there as a matter of right after any substantial number of years without action being taken by navigation interests to remove them." (A. 27-28)
>
> "The Court finds that the primary and effective cause of the collision on February 12, 1970, between the DEL RIO and the TP&W Bridge was the excessive width of the tow at three barges or 105 feet wide, in conjunction with a length of four barges and a weight in excess of forty million pounds, in conjunction with the known opening between bridge piers of successive bridges not over 400 feet apart involving openings of about 120 feet, leaving less than 15 feet for lateral maneuvering between those bridges and the spans of the piers thereof requiring maneuvering close to the shore with recognized possibility of unfavorable navigational conditions developing therefrom and the inability of the vessel rigged, as aforesaid, to stop forward motion when the danger of collision became apparent.
>
> "The Court finds that under these conditions the vessel in that configuration was not seaworthy and that the lack of seaworthiness under the conditions known to exist with the knowledge and privity of the owner and charterer both.
>
> "Accordingly, the Court concludes, as a matter of law, that there can be no exoneration; that petitioners in this cause are liable for the damages to the Toledo, Peoria and Western Railway Company and to Cargo Carriers, Inc., without limitation." (A. 31)

Wasson argued to the Court of Appeals, in substance, that the TP&W bridge was not a lawful structure where, as here, it materially impeded navigation under present day conditions and that it was not an actionable wrong toward the owner of such a bridge to take a tow of usual and customary size and shape through such bridge, even if such navigation involved "unreasonable" risk of damage to the unlawful bridge.

The Court of Appeals decided this issue, without any elaboration, as follows:

> "The questions raised on appeal are:
>
> (1) Did the District Court err in finding Wasson liable?
>
> (2) Did the District Court err in finding the railroad company free from liability?
>
> "We shall dispose of the first question by stating that we agree with the District Court's findings regarding the unseaworthiness of the DEL RIO as rigged at the time of the collision, and that we affirm the conclusion of the District Court that the unseaworthiness of the DEL RIO imported liability to her owner and charterer for the collision between the DEL RIO and the railroad bridge.
>
> "Wasson clearly admitted that when a vessel operator attempts to move a 105-feet wide tow through a 118-feet bridge span, an inherently dangerous situation is created,—a situation providing an insufficient margin of safety to allow for natural hazards such as the risk of bank suction. It is clear from the testimony of the witnesses that such bank suction did in fact occur and that it was a contributing cause to the collision. Under these circumstances, we agree with the District Court's determination that the DEL RIO, as rigged, was unseaworthy for the purpose of navigating through the railroad bridge." (Opinion p. 10)

In a concurring opinion Circuit Judge Stevens made the following comment:

> "Perhaps I should add that I cannot accept Wasson's argument that the railroad should bear the entire loss because the increasing demands of commerce over the years since 1857, when the bridge was originally constructed, have transformed a once lawful structure into an illegal obstruction to navigation. Assuming arguendo that the legal premise is valid, I am nevertheless satisfied that a private party may not, with impunity, simply knock the bridge down with an unseaworthy tow of barges." (Opinion p. 23)

Wasson files its cross petition for writ of certiorari upon the sole question as to whether, in law, Wasson committed an actionable wrong against the owners of the TP&W bridge by assembling a tow, three barges wide, in accordance with universal custom, to navigate the TP&W bridge, even though that may have created an "unreasonable" risk of harm to the bridge.

REASONS FOR GRANTING THE WRIT

The Supreme Court has a special relationship to substantive maritime law. *Wilburn Boat Company* v. *Fireman's Fund Insurance Company*, 371 U.S. 854.

The relationship here involved is the lawful extent of the right of navigation interests to use navigable waters for navigation purposes.

This is an appropriate question for decision by the Supreme Court of the United States, since it involves the holding by the lower courts that a universal practice of navigation interests is unlawful.

The TP&W bridge was built in 1857. (A. 29, 105)

Prior thereto it was the law, not since overruled, that a bridge is an unlawful obstruction to navigation if it materially impedes navigation. *State of Pennsylvania* v. *The Wheeling &c. Bridge Co., et al.*, 13 Howard (54 U.S.) 518 (1851). There the State of Pennsylvania, on behalf of its citizens, sued to enjoin construction of a bridge over the Ohio River which would prevent seven steamboats then in existence, of the 230 steamboats that used those waters, from utilizing the bridge because their chimneys were too tall to pass under the clearance to which the bridge had been built. The Court there held that the legal question presented was not whether the benefit conferred by the bridge upon commerce was greater than the injury done to navigation interests. The Court held that the decisive question was whether the bridge constituted *any* material obstruction to navigation. Specifically the Court held:

> "If viaducts must be thrown over the Ohio for the contemplated railroads, and bridges for the accom-

> modation of the numerous and rising cities upon the banks of the river, it is of the highest importance that they should not be so built as materially to obstruct its commerce." *State of Pennsylvania* v. *The Wheeling &c. Bridge Co.*, 13 Howard (54 U.S.) 518, 575-577 (1851).

This case accordingly establishes, first, that private individuals have a legally protected interest in whether a particular bridge obstructs their use of the navigable waters and, secondly, that the test as to whether such obstruction exists is whether the bridge constitutes a material impedement to navigation.

Other cases to similar effect are *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907), *C. B. & Q. Railway* v. *Drainage Commissioners*, 200 U.S. 561 (1906), *Louisville Bridge Company* v. *United States*, 242 U.S. 409 (1917).

The next line of relevant authority is that which holds that if navigation and commerce on the river develop after construction to such an extent that the bridge interferes with navigation, in its changed condition, then the bridge becomes unlawful.

The leading case to that effect is *West Chicago Street Railroad Company* v. *The People*, 201 U.S. 506 (1906). There an owner of a tunnel under the Chicago River was required to relocate the tunnel at a lower elevation, to allow more clearance above it, because of the increasing needs of navigation for a deeper channel — even though the tunnel had concededly been lawful when built. The operative language of the opinion by the Supreme Court of Illinois was as follows:

> "The title to land under a navigable river is not the same as the title to the shore land. The title to the upland is absolute and paramount, while the

title to the lands over which the navigable water flows is subordinate to the public right of navigation. In a navigable stream the public right is paramount, and the owner of the soil under the bed of such a stream can only use and enjoy it in so far as is consistent with the public right, which must be free and unobstructed. Many decisions are cited and commented upon by counsel, but they all recognize these rules of law and none of them deny their existence or propriety. It makes no difference, therefore, whether the defendant, in building the tunnel, was attempting to exercise the right of a private owner or rights conferred by the Horse and Dummy act. Under these established rules an owner who erects a structure, whether it be a tunnel or whatever it be, in the soil under the navigable water, does it at his peril, and if it becomes an obstruction to the paramount right of navigation he may be compelled to remove it. It necessarily follows that in requiring this tunnel to be removed no property of the defendant is taken or damaged. There is no interference with anything which the owner has a right to maintain, and the fact that it will require an expenditure of money by the defendant does not establish its right to compensation. There is no attempt to appropriate any property of the defendant to the public use or to deprive it of any right, but the only purpose of the proceeding is to protect the paramount right of the public to the navigation of the river. As there is nothing to be taken there is nothing to be compensated for." *West Chicago Street R.R. Co* v. *People*, 214 Ill. 9 (1905) at p. 20.

The case was subsequently appealed and affirmed. This court said:

"The railroad company, in consideration of certain rights and privileges granted to it by the city, undertook to construct the tunnel; and it is true that when constructed the tunnel did not interfere with naviga-

tion; nor would it now obstruct navigation, if only boats and vessels of the size and capacity in use when the tunnel was constructed were engaged in commerce on the river. But such boats and vessels are insufficient to meet the present needs of commerce at Chicago. The business of that city has enormously increased since the passage of the ordinance of 1888, and, admittedly, the tunnel is now an obstruction to free navigation on the river by boats and vessels of large size.

* * *

"In addition to these considerations we may suggest the important one that the rights of the company, as the owner of the fee of land on either side of the river or in its bed, were subject to the paramount right of navigation over the waters of the river. (Citations omitted) The principle is thus declared by a leading text-writer: 'The privilege of navigation upon all waters which are capable of such use in their natural condition and are accessible without repassing upon private lands, is a common and paramount right. . . . At common law the right of navigating a public stream is paramount to the right of passage cross the stream by means of a bridge.' *Gould on Waters*, §§86, 88.

* * *

"If the obstruction cannot be removed except by lowering the tunnel to the required depth and (if a tunnel is to be maintained) providing one that will not interrupt navigation, then the cost attendant upon such work must be met by the company. The city asks nothing more than that the railroad company shall do what is necessary to free navigation from an obstruction for which it is responsible, and (if it intends not to abandon its right to maintain a tunnel at or near Van Buren street) that it shall itself provide a new tunnel with the necessary depth of water above it." *West Chicago Railroad* v. *Chicago*, 201 U.S. 506, 521, 524-525 (1905).

This principal has since been applied in other cases by Illinois courts.

In *People* v. *Metropolitan Ry. Co.*, 285 Ill. 246 (1918) the court held as follows:

> "The Metropolitan Company and the public, for the purpose of navigation, had mutual rights in the Chicago river at the point where the bridge crossed the river. Observing those rights, the bridge was constructed to accommodate the needs of the Metropolitan Company and to not seriously affect navigation. Because of increased commerce in the Chicago river, together with the increased size of the boats used in such commerce, the bridge has become a hinderance or unreasonable obstruction. While this was not so at the time the bridge was erected, changed conditions have made it so. It is well established by the authorities herein cited that the duty of a railroad company to restore a stream or highway which it crosses by the line of its road is a continuing duty, and that if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad company to make such alterations as will meet the present needs of the public. This is true whether or not the stream crossed is navigable." 285 Ill. at p. 260

In this case the evidence established, wholly without dispute, that the universal custom, usage and practice on the Illinois River at and prior to this casualty was for river barges being moved by towboats of equivalent horsepower to the DEL RIO to be assembled into tows of twelve loaded barges, and on occasion up to fifteen barges, and to make up the tows to a width of three barges — or 105' wide. (A. 65, 150-151, 179, 187, 203)

The DEL RIO tows were customarily and regularly made up in that same manner. (A. 150-151, 203)

Both lower courts held that this rendered the tow "unseaworthy". That finding consists of an implicit conclusion that Wasson, as a navigating interest, had a duty, in favor of the bridge owner, to refrain from subjecting its bridge to the risks involved in conducting navigation in accordance with the universal custom on that river at that time.

It is the contention of Wasson that this implicit conclusion is decisively at variance with the foregoing lines of authority holding first that the rights of navigation are paramount and secondly that the owner of a bridge is itself in violation of law when it fails to accommodate its bridge size, including its draw opening, to the developing needs of navigation.

The essence of this controversy is found in the holding of the District Judge as follows:

> "I just do not think that river traffic can continually increase its size and weight, length and breadth to the point where it becomes dangerous under the natural river conditions to navigate it through existing bridges, which I think are presumed to be there as a matter of right after any substantial number of years without action being taken by navigation interests to remove them." (A. 27-28)

Under the *West Chicago Street Railroad Company* case (201 U.S. 506) river traffic can continually increase its size and weight and length and breadth to the point where it becomes dangerous under the natural river conditions to navigate it through existing bridges. In such situation it is the duty, prescribed by *West Chicago*, to modify such existing bridge so that it is no longer dangerous to navigate tows of such size and weight, length and breadth, through the bridges. The right of navigation is paramount

and, insofar as that right is infringed by such a bridge, it is the bridge, and not the right of navigation, which must yield.

Moreover there is no presumption that an existing bridge is a lawful bridge merely because navigation interests have not taken any adverse action. That, again, is the learning of the *West Chicago Railroad* case, and in particular the holding of the Supreme Court of Illinois, 214 Ill. 9, 20, wherein the rights of the owners of structures in navigable waters were sharply distinguished from the rights of land structures. The right of the bridge owner in navigable waters must yield to the paramount rights of navigation and the lapse of time without action by the authorities is not proof that, at any particular time, the bridge owner has not failed to comply with its obligation to rebuild the bridge.

The error of the Court of Appeals was in its conclusion that "under these circumstances we agree with the District Court's determination that the DEL RIO, as rigged, was unseaworthy for the purpose of navigating through the railroad bridge."

This conclusion by the Court of Appeals, and by the District Court, assumes that the seaworthiness of the tow is a relevant issue. That assumes the very issue which is here controverted. Specifically, it is the position of Wasson that whether the tow is "unseaworthy" is not a proper issue in a controversy between the owner of a bridge and the tow where, as here, the bridge owner had a legal duty to rebuild the structure to accommodate the larger size tow which was both customary on the rivers and in use by Wasson.

Here a fundamentally unreasonable relationship existed between a 105' tow width and 118' bridge width. That

essential finding of fact was made by the District Court, affirmed by the Court of Appeals and is not here controverted by Wasson. The legal question presented is whether, on the one hand, Wasson was obligated to reduce the size of its tow or whether, on the other hand, the owner of the bridge was obligated to rebuild.

Under the *Wheeling Bridge* case and *Metropolitan West Side Elevated* case, *supra,* the burden of rebuilding lay upon the owner of the bridge.

Additionally, Judge Stevens was in error in his statement, as follows:

> "Perhaps I should add that I cannot accept Wasson's argument that the railroad should bear the entire loss because the increasing demands of commerce over the years since 1857, when the bridge was originally constructed, have transformed a once lawful structure into an illegal obstruction to navigation. Assuming arguendo that the legal premise is valid, I am nevertheless satisfied that a private party may not, with impunity, simply knock the bridge down with an unseaworthy tow of barges."

Wasson does not claim any right to knock a bridge down "with impunity". The only claim Wasson makes is that it had a legally protected right to make up its tows in the size and shape that was customary on the Illinois River at that time. If that act implicitly created a risk to the bridge of damage then that risk was the consequence of the bridge owner's failure to rebuild its bridge as it was lawfully required to.

There is no finding below of any fault or error in the actual conduct of the navigation passing through the TP&W bridge. There is no claim that the pilot was going too fast, that he was keeping an improper lookout, that

he was proceeding at undue speed, that he failed to take proper evasive action, or that he was careless or negligent in any other respect.

If there had been such a finding Wasson would have been able to limit its liability to the value of its vessel which was here found by the lower court to be in the amount of $270,875. This is considerably less than the award of damages adversely entered by the District Court originally and, even, than the "half damages" awarded by the Court of Appeals.

There was *no* finding of error in the navigation of the DEL RIO tow. The question, accordingly, is as stated, whether TP&W bears the risk of "non-negligent" collision with its bridge where the sole relevant act adversely claimed is the act of making up the tow in accordance with the usual and customary practices on that river at that time.

Accordingly there is no viable issue as to whether Wasson claims a "right" to knock down bridges "with impunity". The question is whether an otherwise non-negligent passage through a bridge is actionable solely because the tow was made up in accordance with unusual and customary practices on the river, and where the danger to the bridge, arising out of the unreasonable relationship between navigation by any such tow and the bridge structure, is created by the failure of the bridge owner to maintain its structure, in navigable waters, in accord with increasing needs of maritime commerce.

There is no issue, either, as to whether the tow was "unseaworthy" since that assumes the conclusion. The question, again, is whether the owner of a bridge who has

failed to modernize its bridge structure in accordance with its legal obligation, has a legally protected right to have all navigation on the river artificially reduce its size and weight, length and breadth, in order to accommodate that bridge in its then present condition.

The issue which will be submitted to the Court if the instant cross petition for writ of certiorari is granted, is whether the rights of navigation are sufficiently paramount over the rights of an owner of a bridge which has failed in its duty to meet the needs of river commerce, so that it does not constitute an actionable wrong in the event of *non-negligent* collision therewith.

That is an issue which is fundamental to the proper functioning of the relationship between river commerce and the rights of those having structures in navigable waters.

As such it is an appropriate issue upon which to exercise the discretionary power to issue a writ of certiorari.

Conclusion

For the above and foregoing reasons Wasson respectfully requests that this Court issue its writ of certiorari to review the decision below.

Respectfully submitted,

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RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents pray that the Writ of Certiorari prayed for by petitioner herein to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on April 17, 1974 shall not issue.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

THERE EXISTS NO CONFLICT BETWEEN THE COURTS OF APPEALS

The alleged conflict between the decision below and the decision of the Ninth Circuit in *Oregon* v. *Tug Go-Getter*, 468 F.2d 1270 (9th Cir. 1972) is illusory. The *Go-Getter* case involved a bridge built in 1954 under a permit which *did not require pier protection*. 468 F.2d at 1272, 1273. In the present case, the applicable 1936 War Department permit *required* that the bridge maintain pier protection. This distinction makes *Go-Getter* an entirely different case than here presented, where the applicable common law authorities, federal permit and governing Illinois statute required adequate pier protection, in good repair. *Southern Transp. Co.* v. *Philadelphia, B. & W. R. Co.*, 205 F. 732 (4th Cir. 1913); *M. P. Howlett, Inc.* v. *The Catherine Carroll*, 56 F. Supp. 466 (D.C.N.Y. 1944); *City of Milwaukee* v. *Kensington S.S. Co.*, 199 F. 109 (7th Cir. 1912); *Wilmington Transp. Co.* v. *Standard Oil Co.*, 53 F. 2d 787 (9th Cir. 1931); *Cleveland-Cliffs Iron Co.* v. *Grosse Isle Bridge Co.*, 239 F. Supp. 872 (E.D. Mich. 1964); *The Fort Fetterman* v. *South Carolina State Hwy. Dept.*, 261 F.2d 563 (4th Cir. 1958).

There exists no meaningful conflict among the Courts of Appeals on this issue.

II.

THE RULE OF DIVIDED-DAMAGES IS WELL ESTABLISHED

In 1855 the United States Supreme Court unanimously settled on the Admiralty principle of divided damages, saying:

> "Upon this view of the case, it becomes necessary to settle the rule of damages in a case where both vessels are in fault. The question, we believe, has never until now come distinctly before this court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss.... This seems now to be the well-settled rule in English Admiralty. (cases omitted)
>
> Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in navigation." *The Catherine* v. *Dickinson,* 58 U.S. (17 How.) 170, 177-78 (1855).

The rule of equal division in cases of mutual fault has been consistently adhered to ever since. Thus in 1952 this Court said,

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that mutual wrong-doers shall share equally the damages sustained by each, as well as personal injury and property damages inflicted on innocent third parties." *Halcyon Lines* v. *Haenn Ship C. & R. Co.,* 342 U.S. 282, 284 (1952).

The present case offers no good reason to abandon the century-old rule. The sole fault attributed to Respondent — Towing Company below was in making up its tow three barges wide. The fault of the Railroad was found to be

its failure to maintain 166 feet of sheer fencing and pier protection, the purpose of which has been recognized by many courts:

> "The bluff of (the vessel's) bow struck the fender piling designed to prevent collisions between vessels and the northernmost pier, or to break the force of such collisions as might take place.
>
> • • •
>
> Properly placed and maintained piling will usually keep vessels from coming into contact with the piers and abutments of drawbridges, and will greatly reduce the destructive effects of many of the collisions which cannot be altogether prevented. *Southern Transp. Co.* v. *Philadelphia, B. & W. R. Co.*, 196 F. 548, 549, 550-51 (D. Md. 1912), *aff'd*, 205 F. 732 (C.A. 4, 1913).
>
> It is common knowledge that fenders are provided at bridge abutments, both for the protection of the abutment, and the boats passing through. *M. P. Howlett, Inc.* v. *The Catherine Carroll*, 56 F. Supp. 466, 476 (D.C.N.Y. 1944)

The record also indicates that this was the purpose of sheer fencing here.

> "Q. At that time, Captain, the time of this accident, was there any other pier protecting this east channel or pier number 3 of the TP&W Bridge? I have in mind either protective cells, such as we have depicted here at the Franklin Street Bridge, pile clusters, sheer fencing or any other pier protection.
>
> A. No, sir, none whatsoever. It was bare concrete pier.
>
> Q. Is this sheer protection also referred to as a guidewall? Is that a synonym for 'sheer protection?'
>
> A. Yes, sir, that's the purpose of a sheer fence, to sheer a tow off a protected pier or such.

Q. To straighten out the tow and guide it through a channel, is that fair to say?
A. Yes, absolutely."
A.58

In view of the foregoing, Circuit Judge Stevens concluded below, "I have no doubt that there was mutual fault because the railroad completely failed to discharge its duty to provide adequate pier protection.... I therefore agree that the damages should be divided." (Pet. A-23). Petitioner has not presented any reasons which indicate that such a conclusion was incorrect.

Finally, Petitioner quotes the language of *Moragne* v. *States Marine Lines,* 398 U.S. 375 (1970) to support its petition here. But that reliance is misplaced since *Moragne* dealt solely with the right to recover for wrongful death under general maritime law, and had nothing to do with the issues raised here.

To say that because of Petitioner's misconception of legal causation, there exist significant and recurring problems concerning the divided damages rule is to extend the purposes of the certiorari procedure beyond reasonable limits.

Moreover, even if this Court were to conclude that the established maritime rules of divided damages were appropriate for review, this is an inappropriate case. Here this bridge had stood for 113 years, and withstood the hammerings of river traffic because, and only so long as, adequate pier protection was maintained. Respondent deliberately stopped repairing the sheer fencing, prior to this casualty. (A.206, 207, 209) Its officers knew that endangered the bridge piers. (A.214, 215) Replacement with a steel and concrete cell would have cost $30,000 at

most. (A.209) If the expense of $30,000 had been incurred, as was the duty of the bridgeowner, its damages here would have been $30,000 or less. Accordingly if damages are not to be equally divided as decreed by the Court of Appeals, then the railroad's damages should be limited to $30,000 — instead of over $400,000. That, however, is far from a typical case that arises in connection with the divided damages rule.

III.

THE PENNSYLVANIA RULE WAS PROPERLY APPLIED BELOW

For the reasons stated by the Court of Appeals, in a scholarly opinion, application of the *Pennsylvania Rule* was proper.

Moreover here the cause in fact, and proximate cause, of the damages complained of was plainly the railroad's failure to maintain its pier protection in good order and condition. The purpose of such sheer fencing is to sheer vessels off and thus prevent impacts with bridges. (A.58) Accordingly it was not strictly necessary for the Court of Appeals to decide the case on a *Pennsylvania Rule* basis, since another basis existed — that the absence of pier protection was the actual proximate cause of the railroad's damages.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny the petition for the issuance of its writ of certiorari to review the decision below.

Respectfully submitted,

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